

1 Sonya D. Winner (Bar No. 200348)
2 swinner@cov.com
3 Nathan E. Shafroth (Bar No. 232505)
4 nshafroth@cov.com
5 Isaac D. Chaput (Bar No. 326923)
6 ichaput@cov.com
7 COVINGTON & BURLING LLP
8 Salesforce Tower
9 415 Mission Street, Suite 5400
10 San Francisco, California 94105-2533
11 Telephone: + 1 (415) 591-6000
12 Facsimile: + 1 (415) 591-6091

13 Attorneys for Defendant
14 MCKESSON CORPORATION
15 (Additional parties and counsel listed on signature page)

16
17 **UNITED STATES DISTRICT COURT**
18
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

20 CITY AND COUNTY OF SAN FRANCISCO,
21 et al.,

22 Plaintiffs,

23 v.

24 PURDUE PHARMA L.P., et al.

25 Defendants.

26 Civil Case No.: 3:18-CV-07591-CRB

27 **DEFENDANTS' RESPONSE TO
28 PLAINTIFFS' PROPOSED CASE
SCHEDULE**

Honorable Charles R. Breyer

29 Plaintiffs' response to the Court's request for a plan for discovery and related schedule offers
30 almost nothing of substance to explain the basis for the aggressive schedule plaintiffs propose. Their
31 submission offers little constructive assistance in answering the questions the Court posed at the recent
32 status conference: “[W]hat [is] the playing field going to be like?” and “What really has to be done?”
33 February 26 Tr. at 14. There are at least three important factors bearing on the schedule that plaintiffs
34 fail to discuss, either at all or in any meaningful way: (1) the actual scope of their amended complaint,
35 (2) the *specific* discovery that will be needed in this case, and (3) the unprecedented COVID-19

1 pandemic that will for the foreseeable future impose substantial strain on the resources of *both* plaintiffs
 2 and defendants – the former as they work to provide critical public services in this time of crisis, the
 3 latter because they serve critical components of the pharmaceutical supply chain that is needed to
 4 support that effort, and both sides because of the unprecedented restrictions and demands currently
 5 imposed on both governments and businesses.

6 **I. What Is the Playing Field?**

7 Defendants are still analyzing plaintiffs' First Amended Complaint ("FAC") – a behemoth that
 8 has ballooned by 125 new pages from 583 paragraphs covering 159 pages to **925** paragraphs over **284**
 9 pages. *Compare* Dkt. No. 128 *with* Dkt. No. 1.¹ The FAC illuminates the sprawling nature of plaintiffs'
 10 claims and the amount of discovery they will require. Far from streamlining the case substantially, as
 11 the Court anticipated (*see* February 26 Tr. at 13-14), the FAC adds a new defendant – Walgreen Co. – a
 12 chain of dispensing pharmacies that is in a different segment of the pharmaceutical supply chain from
 13 the other defendants, all but one of whom are either pharmaceutical manufacturers or wholesale
 14 distributors.² Plaintiffs have dropped one of the prior defendants, a small manufacturer, but the net
 15 effect is to expand the complexity of the case significantly.

16 Plaintiffs' prior suggestion that they intended to streamline their claims has also proven largely
 17 illusory. Although the number of individual "causes of action" set out separately in the FAC is lower,
 18 only one truly separate cause of action – negligence – has been dropped. Otherwise, the only
 19 "streamlining" that has occurred has been to consolidate overlapping claims into a smaller number of
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21 ¹ No redline was supplied with the amendment as required by the Court's Standing Order. Following a
 22 request from defendants, plaintiffs supplied a redline on March 18, 2020. In a footnote, the FAC
 23 suggests that many (although certainly not all) of the new allegations were taken from the complaint in
 24 an MDL case brought by Summit County, Ohio. FAC at 3 n.4. Plaintiffs may hope to argue that
 25 defendants do not need discovery as to those portions of the amendments because they were able to take
 discovery from Summit County in Track 1 in the MDL. But insofar as these allegations have any
 significance to *San Francisco* (and if they do not, they should not have been included), defendants have
 had no pertinent discovery on those aspects.

26 ² Defendant Noramco, Inc. is an active pharmaceutical ingredient manufacturer (*i.e.* a component
 27 supplier). Noramco does not market, promote, distribute, manufacture, sell, or dispense any finished
 opioid medications.

1 separate counts.³ Even ignoring all of the added complexity that almost surely exists in a complaint that
 2 is now nearly 80% longer than its predecessor, it is clear that the FAC presents a highly complex set of
 3 claims on which substantial discovery will be needed.

4 This is confirmed by the Fact Sheet that plaintiffs submitted for this case in the MDL, which –
 5 among other things – identifies **fifty-five** categories of damages sought, cutting across what appear to be
 6 dozens of different constituent city and county departments, agencies, and other entities. *See* Dkt. No.
 7 66-2 at 3-4. Defendants submitted this document as an exhibit to their original status report on
 8 February 19 (*id.*), but plaintiffs have not addressed it in either of their subsequent filings. They have
 9 offered no indication that the scope of their damages claims has changed in any material way.

10 Finally, plaintiffs' proposed schedule is silent as to a date for defendants to respond to the FAC.
 11 Defendants anticipate filing motions to dismiss that pleading and suggest a deadline of **April 17**, with a
 12 proposed hearing date of **June 5**.⁴

13 **II. What Really Has to Be Done?**

14 Plaintiffs' March 13 submission offers no substantive response to the Court's question
 15 concerning "what really has to be done?" It identifies no specific discovery that plaintiffs expect either
 16 to provide or to seek. And plaintiffs offer only one largely non-substantive response to the Court's
 17 follow-up question of "What may not have to be done?" February 26 Tr. at 14. On that second
 18 question, plaintiffs' only suggestion is that, to expedite discovery, plaintiffs should only be required to
 19 produce documents from 20–25 document custodians, with defendants able to obtain production from
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21 ³ For example, instead of repeating the nuisance claim in two counts, the FAC now asserts it in one
 22 count. It asserts the RICO claims in two counts rather than three. And it drops a purported separate
 23 "cause of action" for fraudulent concealment, which was never a stand-alone cause of action to begin
 with.

24 ⁴ In their status report filed on February 19, plaintiffs suggested that motions to dismiss might not be
 25 needed because of rulings made on similar claims in the MDL. As defendants explained in their
 26 response (Dkt. No. 81 at 3-5), plaintiffs' suggestion that some of those rulings might be "law of the
 27 case" was simply wrong, as (among other things) none were entered in *this* case or purported to address
 either the claims in this case or the law on which those claims are based. Indeed, plaintiffs themselves
 have acknowledged that at least some of their claims (the claims under the California UCL and FAL)
 did not even have analogs in rulings made in the MDL in other cases. Dkt. No. 82 at 2-3. Moreover,
 some defendants anticipate filing motions to dismiss for lack of personal jurisdiction.

1 additional custodians only with leave of court. *See* Dkt. No. 129 at 2. But plaintiffs do not identify who
 2 any of those custodians would be; nor do they provide any explanation that would assure either
 3 defendants or the Court that this would be a reasonable limit. Plaintiffs' only justification for this
 4 proposed limitation is the self-serving assertion that the conduct they allege is "egregious." Dkt.
 5 No. 129 at 1. If plaintiffs mean to suggest that the Court should set a schedule that deprives defendants
 6 of discovery to which they would otherwise be entitled because the complaint addresses important
 7 issues, they have it backward. A case of this importance, more than any other, should be litigated based
 8 on a complete record that affords all parties the opportunity to develop all relevant facts. To compound
 9 matters, plaintiffs suggest no limit on the discovery they would be allowed to seek from defendants –
 10 even though they have never disputed that the vast majority of the discovery they would need from most
 11 defendants has already taken place in the MDL and need not be repeated here.

12 The only other point about discovery plaintiffs offer in their March 13 submission is a veiled
 13 reference to "databases" that are "slated to be decommissioned in the coming months." Dkt. No. 129 at
 14 1. Plaintiffs suggest that they will "work with" defendants to generate "relevant reports" before that
 15 happens. *Id.* But they do not even identify what these "databases" are or what information they contain.
 16 For the avoidance of doubt, plaintiffs are subject to the same document preservation obligations as any
 17 litigant, and defendants object to any "decommissioning" that would make relevant information
 18 inaccessible.

19 Because plaintiffs failed entirely to identify what discovery needs to be done, defendants make
 20 an effort to do so here.⁵ The following discussion is by necessity preliminary and incomplete, as
 21 defendants have not yet received any concrete information from plaintiffs about where discoverable
 22 information is likely to be found.

23 The scope of the discovery defendants need flows from the dramatic breadth of plaintiffs'
 24 claims, which seek to assign to an array of defendants responsibility for a complex public health issue
 25 that (according to plaintiffs themselves) has developed over decades. For example, plaintiffs seek to

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 27 ⁵ Given the lack of substantive discussion in plaintiffs' March 13 filing, defendants reserve the right to
 28 seek leave to file a surreply to address any new facts or arguments plaintiffs seek to present in their
 reply.

1 hold defendants responsible for issues involving illicit opioids like heroin in addition to those relating to
 2 prescription drugs, necessitating discovery into the history, causes, extent, and current status of illegal
 3 opioid problems in San Francisco. Plaintiffs even suggest that defendants are responsible for drug abuse
 4 involving non-opioid illicit substances such as methamphetamine, Dkt. No. 128 ¶¶ 59, 68, which is an
 5 entirely new allegation. Given experience in other cases – and even ignoring the unprecedented
 6 impediments both sides currently face from the COVID-19 pandemic – discovery in this case will take
 7 far longer than the seven months plaintiffs estimate.

8 **A. Categories of Discovery**

9 As defendants have previously explained, they are starting this case from Square One with
 10 respect to discovery of plaintiffs and third parties with relevant information. Dkt. No. 66 at 4-7; Dkt.
 11 No. 81 at 2-3.⁶ Apart from a bare-bones Fact Sheet and a handful of documents, defendants have
 12 received no discovery from plaintiffs. Dkt. No. 66 at 4-7. The needed discovery will entail extensive
 13 documentary and testimonial evidence from many sources. And the timeframe to be addressed is
 14 lengthy, both because plaintiffs' allegations span decades (*see, e.g.*, Dkt. No. 128 ¶¶ 3, 777) and because
 15 San Francisco has faced problems with substance abuse for at least that long, if not longer. For
 16 example, a 2001 New York Times article referred to heroin use in San Francisco as "an old nemesis"

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6 Certain of the manufacturer defendants – the Teva, Janssen, Endo, and Allergan Defendants –are also defendants in an opioid matter pending in Orange County, *People of the State of California v. Purdue Pharma, L.P. et al.*, Case No. 30-2014-00725287-CU-BT-CXC (the "Orange County Action"). The defendants in the Orange County Action have obtained discovery from certain of the third parties discussed below. Although those efforts may streamline some third-party discovery here, significant third-party discovery remains outstanding for *this* action, even as to the third parties who were subpoenaed in Orange County. Among other things: (1) most of the defendants in this action, including all of the distributor defendants, Mallinckrodt, and Walgreens, are not parties to the Orange County Action and will require discovery on issues that pertain to the distinctly different liability theories asserted against them; (2) unlike plaintiffs in the Orange County Action, plaintiffs in this action are asserting claims predicated on defendants' suspicious order monitoring practices, which will present additional discovery needs for all defendants here; and (3) as discussed further below, nearly all of the third-party discovery in the Orange County Action was tethered specifically to the plaintiff jurisdictions there, not San Francisco.

1 and described rampant and public use of heroin in the city.⁷ Understanding this longstanding issue is
 2 necessary because plaintiffs seek to hold defendants liable for the heroin and other opioid issues San
 3 Francisco now faces.

4 Plaintiffs allege that defendants' conduct has impacted nearly every aspect of city and county
 5 government over the past two decades, and the City and County of San Francisco employ more than
 6 37,000 people.⁸ According to plaintiffs' Fact Sheet, the City and County of San Francisco has 125
 7 departments and divisions (Dkt. No. 66-2 at 5-10); defendants believe that approximately 40 of these
 8 departments and divisions are likely to have discoverable information.⁹ Many, if not all, of these
 9 departments and divisions will have multiple individuals with relevant knowledge whose custodial files
 10 will need to be collected and produced, and depositions will be necessary from many of them. Further,
 11 due to personnel changes over time, it is likely that multiple individuals will have held key roles over
 12 time, multiplying further the number of individuals whose files will need to be examined and/or who
 13 will need to be deposed. And this is just for party discovery; defendants also anticipate the need for
 14 substantial third-party discovery.

15 Based on a preliminary review of the FAC and plaintiffs' Fact Sheet, the following are some
 16 examples of discovery that will be needed:

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 18 ⁷ Evelyn Nieves, "An Old Nemesis Keeps Scarring San Francisco," New York Times (Jan. 9, 2001),
 19 available at: <https://www.nytimes.com/2001/01/09/us/an-old-nemesis-keeps-scarring-san-francisco.html>.

20 ⁸ San Francisco Dept. of Human Resources, 2020 Annual Workforce Report at 3, *available at*
<https://sfdhr.org/sites/default/files/documents/Reports/annual-workforce-report-2020.pdf>.

21 ⁹ These include Adult Probation; Aging and Adult Services; Board of Supervisors; Budget & Legislative
 22 Analyst; Child Support Services; Department of Children, Youth & Families; Office of the City
 23 Administrator; Clerk of the Board of Supervisors; Controller's Office; County Clerk; District Attorney;
 24 Office of Economic & Workforce Development; Department of Emergency Management;
 25 Environmental Department; Fire Commission; Fire Department; Health Service System; Homelessness
 26 and Supportive Housing; Housing Authority; Human Resources; Human Rights Commission; Human
 27 Services Agency; Justice Tracking Information System; Juvenile Probation Commission; Juvenile
 Probation Department; Mayor's Office; Medical Examiner; Mental Health Board; Police Department;
 Public Defender; Office of Public Finance; Public Health Commission; Department of Public Health,
 Department of Public Works; Risk Management; Sheriff's Department; Office of Short Term Rental;
 Single Room Occupancy Task Force; Superior Court; Treasurer / Tax Collector; Veterans Affairs
 Commission; and Veterans' Service Office.

1 **1. Law Enforcement**

2 Plaintiffs claim damages for various law enforcement-related expenditures, including “Increase
3 in criminal investigations,” “Task forces,” “Opioid-related crimes,” and “Threats to public safety.” Dkt.
4 No. 66-2 at 3-4.

5 Even apart from damages specifically sought for law enforcement activities, law enforcement
6 agencies and personnel will be a critical source of discovery on the allegations in the complaint. For
7 example, the San Francisco Police Department possesses much of the most important information
8 concerning the criminal diversion of prescription opioid medications in San Francisco – the basis for
9 every claim asserted by plaintiffs – as well as trafficking of illicit opioids and other drugs. Discovery
10 will also address SFPD’s interactions with drug users in San Francisco, as well as the population of
11 individuals experiencing homelessness (an issue that in San Francisco is reported to be closely
12 intertwined with drug abuse).¹⁰

13 The San Francisco Sheriff’s Office provides security in San Francisco’s courts and public
14 buildings, including Zuckerberg San Francisco General Hospital. It also operates the San Francisco
15 County Jail system. The Sheriff and other officers will be important sources of information regarding
16 the impact of drug and opioid abuse on these operations. The County Jails operate multiple jail-based
17 rehabilitation programs for individuals with substance use disorders; defendants will likely require
18 discovery from these programs. Additionally, the County Jails are major purchasers and prescribers of
19 opioids, and discovery will be needed on the Jails’ controlled substances ordering, dispensing, and
20 storage practices. Plaintiffs claim damages for various expenditures related to the Sheriff’s Office,
21 including “Increased jail costs,” “Juvenile rehabilitation treatment,” “Probation, including probation-
22 related rehabilitation programs,” “Adult and juvenile detention,” and “Damage to City/County buildings,
23 property, open spaces.” Dkt. No. 66-2 at 3-4.

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25 ¹⁰ For one example, between January 2018 and July 2019, more than 150 individuals reported that
26 SFPD and Public Works employees confiscated their naloxone during “homeless sweeps.” Nuala
27 Sawyer Bishari, “Drug Users Face Extra Health Challenges With Uptick in Homeless Sweeps,” SF
28 Weekly (July 25, 2019), available at: <https://www.sfweekly.com/news/drug-users-face-extra-health-challenges-with-uptick-in-homeless-sweeps/>. Naloxone blocks the effects of opioids and can reverse
 opioid overdoses.

1 Significant third-party discovery will also be required of law enforcement agencies, such as the
 2 local offices of various federal agencies. For example, the U.S. Drug Enforcement Administration
 3 maintains information regarding suspicious orders, diversion trends and investigations, and illicit drug
 4 trends and investigations. The Federal Bureau of Investigation has reports on drug trafficking in the
 5 San Francisco area. And the U.S. Attorney's Office has information regarding San Francisco-area
 6 diversion prosecutions of physicians and pharmacists.

7 **2. District Attorney and Courts**

8 Discovery from the San Francisco District Attorney's office will be needed to address the alleged
 9 increase in criminal prosecutions due to the opioid abuse crisis and the identity of non-party criminal
 10 actors and their conduct. Plaintiffs claim damages related to criminal prosecutions, including "Increase
 11 in criminal investigations," "Task forces," "Increased time and expenses for prosecutor and public
 12 defender offices," "Probation, including probation-related rehabilitation programs," "Victim/family
 13 counseling," and "Rehabilitation and treatment programs." Dkt. No. 66-2 at 3-4.

14 Plaintiffs also claim damages related to "Drug court and related programs." Dkt. No. 66-2 at 4.
 15 San Francisco has operated a Drug Court program since 1995 and affiliated Drug Court Treatment
 16 Services since at least 2014. These programs, along with the Family Treatment Court (previously
 17 known as Dependency Drug Court) possess relevant information concerning the scope of opioid and
 18 other drug use within San Francisco, as well as plaintiffs' efforts to address and rehabilitate users of
 19 opioids and other drugs.

20 **3. Emergency Services**

21 Plaintiffs claim damages for various types of expenditures related to "Public Health and First
 22 Responders," including "Counseling for grief, post-traumatic stress disorder and depression,"
 23 "Emergency medical treatment," "Fire and rescue," "Patient transportation," "Narcan/Naloxone
 24 administration," and "Public and employee training on the administration of Narcan/Naloxone." Dkt.
 25 No. 66-2 at 3. The San Francisco Fire Department Division of Emergency Medical Services ("EMS") is
 26 also likely to possess critical information more generally about opioid abuse and treatment.

1 **4. Public Health**

2 Plaintiffs claim damages for various public health-related expenditures, including “Mental health
 3 facilities,” “Needle exchange and prescription drug take-back programs,” “Opioid education programs,”
 4 “Opioid prevention programs,” “Opioid abuse programs,” “Education and prevention of HIV /
 5 Hepatitis C,” “Social Services,” “Increased Veterans Services expenditures,” “Public and employee
 6 training on safe prescription practices,” and “Public and employee training on safe prescription drug
 7 disposal.” Dkt. No. 66-2 at 3. The San Francisco Department of Public Health compiles data by
 8 tracking the impact of substance use and abuse. It will be an important source of discoverable
 9 information on the overdose and death trends in the City and County of San Francisco, as well as the
 10 prevention and training programs that Plaintiffs implemented to mitigate the alleged harm.¹¹

11 Plaintiffs also claim damages related to “Public health clinics” and “Public Hospitals.” Dkt.
 12 No. 66-2 at 3. The San Francisco Health Network is a public healthcare system that includes 14 primary
 13 health care centers, hospital care through the Zuckerberg San Francisco General Hospital and Treatment
 14 Center and Laguna Honda Hospital, urgent care, and behavioral health services. This network of public
 15 health facilities is likely to possess relevant information concerning the scope and impact of opioid and
 16 other drug use within San Francisco.

17 Further, defendants are likely to require third-party discovery from a number of other public-
 18 health agencies and related entities, including: (1) California Conference of Local Health Officers;
 19 (2) California Department of Aging; (3) California Department of Public Health; (4) California
 20 Emergency Medical Services Authority; (5) California Health & Human Services Agency; (6) California
 21 Department of State Hospitals; (7) California Mental Health Services Overnight & Accountability;

22
 23 ¹¹ Topics to be addressed in this discovery may include, *inter alia*, epidemiological data regarding
 24 addiction and mental health treatment and opioid use, abuse, and overdose, and mortality; uniformly de-
 25 identified treatment, encounters, and dispensing records related to opioid prescriptions written and
 26 addiction or overdose treatment provided; records related to treatment with naloxone and other
 27 medically assisted treatment reports; records of grants received from state and federal sources related to
 28 opioids; provider lists and budgets for substance use treatment providers; records related to admissions
 29 to substance use disorder treatment; data related to substance abuse trends and drug availability; and
 30 CURES data reports used by the City and County.

1 (8) California Office of the Patient Advocate; (9) California Department of Managed Health Care;
 2 (10) California Department of Health Care Services; (11) California Office of Health Information and
 3 Integrity; and (12) California Office of Statewide Health Planning and Development.¹²

4 **5. Medical Examiners**

5 Discovery from the Office of the Chief Medical Examiner will be needed to address the alleged
 6 increase in deaths involving both prescription and illicit opioid use for which plaintiffs blame
 7 defendants. Plaintiffs claim damages for various coroner and medical examiner-related expenditures,
 8 including “Morgue space,” “Storage of bodies,” “Indigent burials,” “Cremations and burials,”
 9 “Toxicology testing,” and “Biohazard waste disposal.” Dkt. No. 66-2 at 3. The Office of the Chief
 10 Medical Examiner investigates individual deaths and tracks community health trends. It provides
 11 comprehensive forensic toxicology testing services that assist in determining, or providing verification
 12 of, the cause and manner of death for cases in the Medical Examiner’s jurisdiction. The Office of the
 13 Chief Medical Examiner is likely the only government entity in possession of relevant information
 14 concerning the cause of death and manner of death for deceased individuals who comprise the opioid-
 15 related mortality statistics that plaintiffs cite.

16 **6. Child and Family Services**

17 Discovery from the City and County of San Francisco departments and divisions related to Child
 18 and Family Services will be needed to address the alleged increased costs associated with child
 19 placements, family homelessness and government programs that plaintiffs attribute to opioids. Plaintiffs
 20 claim damages for various types of expenditures related to “Foster care,” “Child support,” “Family and
 21 children’s services,” “Shelters,” and “Family Treatment Court and related programs.” Dkt. No. 66-2 at
 22 3. San Francisco has numerous resources for child and family services such as a 24-hour crisis line for
 23 parents, programs for early childhood development, homeless prenatal programs, and foster care support
 24 agencies. These programs and services, along with many others provided by the City and County of

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 26 ¹² The defendants in the Orange County Action served subpoenas on many of these entities. As noted
 27 above, however, even if the remaining defendants had access to this discovery (which has not yet
 28 occurred), it is almost certain that additional discovery would be needed from most, if not all of them to
 address the specific claims in *this* case.

1 San Francisco are likely to possess relevant information concerning the number of children and families
 2 taken from their homes or otherwise affected by opioids. Such discovery is likely to address, *inter alia*,
 3 policies and practices over time related to investigations and cases opened involving opioids; data
 4 maintained in the County's Child Welfare Services/Case Management System showing the number of
 5 cases involving opioids compared to alcohol and other drugs; drug testing data and contracts;
 6 department budgets; and grants received from state and federal sources.

7 **7. Health Plans and Officials Responsible for Administering Them**

8 Plaintiffs have identified seven "medical insurance plan or carrier, behavioral health carriers, or
 9 workers compensation programs" used by its employees since January 1, 2008 and seven pharmacy
 10 benefit managers or third-party claims administrators it has used since January 1, 2006. Dkt. No. 66-2 at
 11 19-21. In addition to seeking discovery from health plans and claims administrators run by plaintiffs or
 12 made available by plaintiffs to its employees, defendants will also need to collect discovery related to
 13 third-party health plans offered to residents of San Francisco, including large insurers, pharmacy benefit
 14 managers, and private managed care organizations operating in San Francisco. These entities have, *inter*
 15 *alia*, critical claims data demonstrating the number and types of opioids prescribed to San Francisco
 16 residents over time, the healthcare providers who prescribed these opioids, and the conditions for which
 17 they were prescribed.

18 **8. Budget and Finance**

19 Plaintiffs claim that the financial costs from the opioid epidemic "that are already known are
 20 staggering," and identify certain line items in a 2017 budget proposal that were "specifically targeted at
 21 addressing '[t]he surge of opiate abuse and addiction.'" Dkt. No. 128 ¶ 58. Discovery from the Mayor's
 22 Office of Public Policy and Finance, the Controller's Office, and the Board of Supervisors will be
 23 needed to identify any proposed and actual opioid-related expenditures in San Francisco's budget
 24 throughout the relevant time period.

25 **9. Opioid Task Forces**

26 Various San Francisco Departments and Boards operate drug-related tasks forces working to
 27 identify harm reduction strategies to decrease and manage illicit drug (e.g., methamphetamine) use,
 28 develop recommendations on the operation of safe injection services, and advise City government

1 officials on policies to help address drug dealing that is particularly rampant in certain neighborhoods
 2 within San Francisco. These include the San Francisco Methamphetamine Task Force (facilitated by
 3 San Francisco Department of Public Health), San Francisco Safe Injection Services Task Force
 4 (facilitated by San Francisco Department of Public Health), and the Street-Level Drug Dealing Task
 5 Force. Such task forces possess information that is highly important to plaintiffs' claim for damages
 6 related to, *inter alia*, "needle exchange and prescription drug take-back programs," "Narcan/Naloxone
 7 administration," and "task forces." Dkt. No. 66-2 at 4-5.

8 10. Other Third Party Discovery

9 There are several other categories of third parties that have discoverable information relevant to
 10 plaintiffs' claims and defendants' defenses. By way of example only, these categories include:

11 (i) **Professional Regulatory Authorities.** Defendants intend to seek discovery regarding the
 12 identities of, and the investigatory and disciplinary records related to, licensed healthcare professionals
 13 involved in improper prescribing of opioids and pharmacists involved in improper dispensing or
 14 diversion of opioids. Relevant third parties that possess such information include the California Medical
 15 Board, the California Pharmacy Board, the Osteopathic Medical Board of California, the California
 16 Physician Assistant Board, and the California Dental Board.¹³

17 (ii) **Prescription Drug Monitoring Program.** Third-party discovery will be needed from the
 18 California Department of Justice, which administers the Controlled Substance Utilization Review and
 19 Evaluation System ("CURES"), California's Prescription Drug Monitoring Program. CURES maintains
 20 data on controlled substance prescriptions dispensed in California, and is the primary source of data on
 21 who wrote, dispensed, and received opioid prescriptions in California.¹⁴

22
 23 ¹³ In February, the Court in the Orange County Action ordered the California Medical Board and the
 24 Pharmacy Board to produce certain administrative and investigation records related to prescribing and
 25 dispensing misconduct in the jurisdictions at issue in that litigation. The Boards have indicated that they
 26 intend to seek a writ from the California Court of Appeal challenging these rulings. To date no
 27 investigation or administrative records have been produced.

28 ¹⁴ In February, the Court in the Orange County Action ordered the California DOJ to produce the
 29 CURES database insofar as it pertains to opioids, anti-depressants, anti-convulsant/epileptic drugs
 30 (including muscle relaxers) and benzodiazepines, from 1990 to the present, with patient PII de-

(iii) Insurance and Workers' Compensation Providers. Documents and data relating to trends in opioid prescriptions written and dispensed in San Francisco will be of central relevance in this case. Defendants expect to seek documents and data from Covered California, the California Department of Insurance, and the California Department of Industrial Relations Division of Workers' Compensation.

(iv) Professional Organizations. Defendants also anticipate serving subpoenas on certain private professional organizations, including the American Academy of Emergency Medicine, the California Academy of Family Physicians, and the California Medical Association.

(v) **Healthcare Providers.** The manufacturer defendants intend to subpoena healthcare providers who prescribe opioids in the San Francisco area to obtain testimony that will, *inter alia*, help refute plaintiffs' allegations regarding the impact of opioid marketing on prescribing habits and plaintiffs' theory that opioids are not "safe and effective for long-term use." Dkt. No. 128 ¶ 26. Similarly, plaintiffs' dispensing claims against Walgreens implicate the filling of specific prescriptions that, plaintiffs allege, Walgreens pharmacists should not have filled. Walgreens will need to take third-party discovery from the prescribing practitioners and potentially others concerning those prescriptions, whether or they were in fact illegitimate, and whether the dispensed medications were in fact criminally diverted to improper uses as would be necessary to be linked to the harms for which plaintiffs seek recovery from Walgreens based on their dispensing theory of liability.

B. Limitations on Discovery

Plaintiffs state that their proposed case schedule is “manageable” only if the Court severely curtails defendants’ ability to seek discovery. The parties have not yet discussed any limitations on discovery, and the discussion above should make clear why defendants cannot agree to plaintiffs’ proposed limit. Defendants will be prepared to work with plaintiffs in good faith to ensure that discovery proceeds as efficiently as possible, for example, by excluding potential custodians whose files are likely to be cumulative or of marginal relevance. But the breathtaking scope of plaintiffs’ claims.

identified. The DOJ has indicated that it intends to seek a writ from the California Court of Appeal challenging this ruling. To date, DOJ has not produced the CURES data in the Orange County Action.

1 which sweep across dozens of government agencies over multiple decades, makes an arbitrary limit of
 2 20-25 custodians facially unreasonable.

3 Nor is plaintiffs' proposed limitation consistent with the positions of other bellwether plaintiffs
 4 in the opioid litigation. For example, in the recently remanded West Virginia bellwether case, plaintiffs
 5 City of Huntington and Cabell County – which are much smaller than the plaintiffs here – have agreed
 6 to produce files from 44 and 50 custodians respectively, with negotiations over additional custodians
 7 still ongoing. That case, which involves only two claims and three defendants, is much narrower in
 8 scope than the case brought by plaintiffs here.

9 For purposes of comparison, plaintiffs already possess much more expansive discovery from
 10 most or all of the defendants than they suggest they are willing to provide. For example, Janssen alone
 11 has produced files from over 80 custodians – 60 national custodians in Track One of the MDL, and over
 12 20 additional regional custodians in the Orange County action. McKesson produced files from 35
 13 custodians in Track One of the MDL, and has to date produced files from 66 custodians in opioid-related
 14 litigation. Similarly, AmerisourceBergen produced files from 44 different custodians in the MDL and
 15 has to date produced files from 60 custodians in opioid-related litigation. Plaintiffs have access to all of
 16 this material. Defendants do not at this time ask the Court to impose an arbitrary numerical limit on
 17 custodians from whom discovery may be sought from defendants, although they believe any additional
 18 discovery taken from defendants should be strictly confined to matters that are specific to San Francisco
 19 and its claims, with no duplication of discovery already taken on national-level issues.¹⁵

20 **III. Intervening Events: The COVID-19 Pandemic**

21 In a footnote to their March 13 submission, plaintiffs acknowledge that the Coronavirus
 22 pandemic has “had a substantial impact on San Francisco’s ability to operate business as usual” but say
 23 that they would expect to keep to their proposed schedule “[a]ssuming that these effects are relatively
 24

25 ¹⁵ Defendants also believe that witnesses who have previously been deposed should not be subject to
 26 deposition yet again except to the extent needed, upon a showing of good cause, to address
 27 San Francisco-specific issues not addressed in their prior depositions. The parties have not yet met and
 28 conferred on this – or any other specific limitation on discovery – and so defendants do not ask the
 Court to address this question now. Should the parties be unable to work it out, defendants will raise the
 issue with Magistrate Judge Corley.

1 short-lived.” Dkt. No. 129 at 1 n.1. Unfortunately, this optimistic assumption, like many others made
 2 about this fast-growing crisis, was obsolete almost as soon as it was offered. At the time the submission
 3 was filed, both the President of the United States and the Mayor of San Francisco had declared public
 4 emergencies; since that time, the City and County of San Francisco and surrounding jurisdictions have
 5 become subject to unprecedented “shelter in place” orders (extended, as of March 19, to the entire State
 6 of California),¹⁶ the operations of this court have been reduced dramatically,¹⁷ and the timing of
 7 anything approaching a return to “business as usual” is open to substantial question. While defendants
 8 share plaintiffs’ hope that the impacts will be “relatively short-lived,” the City has now itself identified
 9 the crisis as sufficiently severe to require business to be all but shut down until at least April 7. The
 10 return to “business as usual” is surely unlikely for at least several weeks after that. Indeed, the Governor
 11 now anticipates that California public schools, for example, are unlikely to re-open at all this academic
 12 year.¹⁸

13 It is important to recognize that discovery and other litigation efforts of *both* plaintiffs *and*
 14 defendants are severely affected by this situation. The same San Francisco departments and agencies
 15 that will be priority targets for discovery – including public health, law enforcement, and emergency
 16 response – are presumably also among those most overwhelmed with the response to the COVID-19
 17 crisis and its impact. Significantly, many defendants are also at the center of this crisis response, which
 18 requires ongoing dependable access to the medical supplies and medicines that defendants manufacture,
 19 distribute, and dispense to patients and medical providers across the country. Defendants’ employees
 20 are heavily engaged in these and other activities to mitigate the effects of this pandemic on the supply
 21 chain. Almost all defendants have implemented protective measures that all but eliminate travel and

22
 23¹⁶ See Message from Mayor Breed on New Public Health Order, Mar. 16, 2020,
 24 <https://sfdhr.org/sites/default/files/documents/COVID-19/Message-From-Mayor-Breed-on-New-Public-Health-Order-16mar20.pdf>; Cal. Exec. Order N-33-20 (Mar. 19, 2020), <https://covid19.ca.gov/img/N-33-20.pdf>.

25¹⁷ See N.D. Cal. General Order No. 72 (Mar. 16, 2020).

26¹⁸ See Casey Tolan, “Coronavirus: Newsom warns most schools could be closed until summer as
 27 lockdown expands,” The Mercury News (Mar. 17, 2020), *available at*
<https://www.mercurynews.com/2020/03/17/coronavirus-newsom-warns-most-schools-could-be-closed-until-summer-as-lockdown-expands/>

1 strictly limit access to their facilities – except, of course, for Walgreens stores, which Walgreens is
2 going to extraordinary lengths to keep open and operational.

3 These considerations are not limited to this case. Defendants are litigating cases involving
4 similar claims all across the country, and the impact of this situation on discovery is widespread. In
5 numerous cases plaintiffs and defendants alike have taken depositions off-calendar, and many
6 government plaintiffs have begun to make clear that the discovery response efforts from their public
7 health and related agencies will need to be deferred indefinitely as they concentrate on crisis response.
8 Even employees who are not directly engaged in that effort are, according to some plaintiffs' counsel,
9 unable to make meaningful progress on searching for and producing documents while forced to work
10 from home.

11 The outside counsel prosecuting and defending this case are not generally engaged in crisis
12 response efforts, and activities that they can reasonably handle without significant input and effort from
13 their respective clients (and that can reasonably be accomplished under remote-working conditions)
14 should proceed. This would include briefing on motions to dismiss the FAC, as well as the exchange of
15 opening discovery requests and whatever initial discussion of those requests can be made without the
16 need for the *informed* input of key client personnel.

17 **IV. Proposed Case Schedule**

18 Although defendants fully understood and accepted the Court's statements at the February
19 conference about its intent to establish a schedule with a fixed trial date, they respectfully suggest that it
20 would be prudent to defer that decision for 30 days to permit a more informed evaluation of whether the
21 impacts of the COVID-19 crisis will indeed be "short lived" – as *all* parties earnestly hope they may be
22 – or instead are longer-lasting. Defendants suggest that the parties be directed to submit reports in 30
23 days reporting on the status of their current operations and their ability to proceed with discovery in the
24 ordinary course. Meanwhile, defendants propose that motions to dismiss be briefed on the schedule set
25 out above and that both sides exchange their initial written discovery requests (without due dates for
26 responses yet established) so that the lawyers can begin whatever work they are able to accomplish on
27 them, including beginning the meet-and-confer process.

If the Court is reluctant to follow this approach, defendants propose below a case schedule that takes into account the categories of discovery needed and the scope and breadth of plaintiffs' claims. Notably, this schedule assumes (a) that the current pandemic does not materially delay the full initiation (and completion) of discovery and (b) that plaintiffs, true to their word, will be able to comply with their discovery obligations much more expeditiously than their counterparts in other cases have been able to manage even without the extra pandemic-related burdens plaintiffs now face.¹⁹ If they are not able to do so, this schedule will not be workable.

Defendants propose that discovery will be more efficient if it is phased. In light of plaintiffs' repeated representations that they need little time to complete discovery of defendants, defendants' proposed schedule presumes that in the initial period discovery will be limited to written and document discovery taken by defendants from plaintiffs and third parties. Staging discovery in this fashion will promote efficiency, as all parties will be able to focus on the discovery they agree will be most time consuming.

Deadline	Defendants' Proposal	Plaintiffs' Proposal
Fed. R. Civ. P. 26(a) Initial Disclosures ²⁰	April 1, 2020	
Parties may begin serving written discovery, with staggered deadlines for response ²¹	April 1, 2020	April 1, 2020
Motions to dismiss	April 17, 2020	

¹⁹ This proposal also assumes that plaintiffs will commit that they, like plaintiffs in certain other cases, will promptly, after the production of local dispensing data, identify all prescriptions that they allege should not have been filled; this will allow enough time for follow-up investigation and discovery on those prescriptions during the fact discovery period. Similar early identification will be needed of any "suspicious orders" that plaintiffs alleged defendants should not have shipped so that follow-up discovery can be pursued.

²⁰ This assumes plaintiffs are able to confirm that they are able to conduct the requisite interviews of their clients' personnel.

²¹ Ordinary deadlines will apply to plaintiffs' discovery responses except as otherwise stipulated or ordered by the court. To ensure that early attention is focused on the activity that will consume the most time, defendants' responses to written discovery served on or before July 8, 2020 will be due August 7, 2020, and no depositions of defendants' personnel will be taken before that date.

Deadline	Defendants' Proposal	Plaintiffs' Proposal
Oppositions to motions to dismiss	May 8, 2020	
Replies in support of motions to dismiss	May 22, 2020	
Hearings on motions to dismiss	June 5, 2020 at 10:00 a.m.	
Substantial completion of document production ²²	October 2, 2020	
Close of fact discovery	March 5, 2021	October 30, 2020
Plaintiffs' expert reports	March 12, 2021	November 16, 2020
Defendants' expert reports	April 23, 2021	November 16, 2020
Close of expert discovery	May 14, 2021	December 23, 2020
Motions for summary judgment and <i>Daubert</i> motions	May 31, 2021	January 29, 2021
Oppositions to motions for summary judgment and <i>Daubert</i> motions	July 12, 2021	February 26, 2021
Replies in support of motions for summary judgment and <i>Daubert</i> motions	August 6, 2021	March 5, 2021
Hearings on motions for summary judgment and <i>Daubert</i> motions	August 27, 2021	
Parties to lodge and serve witness and exhibit lists ²³	August 27, 2021	
Parties to file juror questionnaire, proposed voir dire questions, and simplified statement of the case	September 3, 2021	
Joint proposed pre-trial order	September 10, 2021	
Motions <i>in limine</i>	September 10, 2021	
Oppositions to motions <i>in limine</i>	September 17, 2021	
Replies in support of motions <i>in limine</i>	September 24, 2021	
Proposed jury instructions and special verdict form	September 24, 2021	

²² This assumes that plaintiffs will produce documents expeditiously and on a rolling basis, so that the majority of the production is received before this deadline. Plaintiffs already have most documents they are likely to need from defendants. Defendants should be able to comply with any reasonable supplemental requests by this date.

²³ These and the following dates are based on the Court's standing jury trial order. Based on experience in other cases, the parties will likely wish to discuss building in more time for some of these items.

Deadline	Defendants' Proposal	Plaintiffs' Proposal
All trial materials due		March 12, 2021
Final Pretrial Conference	October 1, 2021	March 19, 2021
Trial	October 15, 2021	March 29, 2021

* * *

For the foregoing reasons, defendants respectfully request that the Court defer entry of a final schedule for 30 days or, in the alternative, that it enter defendants' proposed schedule, which accounts for the unique scope and scale of this case and provides defendants the bare minimum amount of time necessary to develop the record and prepare for trial.

Respectfully Submitted,

DATED: March 20, 2020

By: /s/ Sonya D. Winner
Sonya D. Winner (Bar No. 200348)
Nathan E. Shafroth (Bar No. 232505)
Isaac D. Chaput (Bar No. 326923)
Covington & Burling LLP
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, California 94105-2533
Telephone: + 1 (415) 591-6000
Facsimile: + 1 (415) 591-6091

*Attorneys for Defendant
McKesson Corporation*

DATED: March 20, 2020

By: /s/ Steven J. Boranian
Steven J. Boranian
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Telephone: (415) 543-8700
Facsimile: (415) 391-8269
sboranian@reedsmith.com

Sarah B. Johansen
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Telephone: (213) 457-8000
Facsimile: (213) 457-8080
sjohansen@reedsmit.com

Attorneys for Defendants
AmerisourceBergen Corporation and
AmerisourceBergen Drug Corporation

DATED: March 20, 2020

By: /s/ Neelum J. Wadhwani
Neelum J. Wadhwani (Bar No. 247948)
Enu A. Mainigi (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
Tel: (202) 434-5000
Fax: (202) 434-5029
nwadhwani@wc.com
emainigi@wc.com

Edward W. Swanson, SBN 159859
August Gugelmann, SBN 240544
SWANSON & McNAMARA LLP
300 Montgomery Street, Suite 1100
San Francisco, California 94104
Telephone: (415) 477-3800
Facsimile: (415) 477-9010
ed@smllp.law
august@smllp.law

*Attorneys for Defendant
Cardinal Health, Inc.*

DATED: March 20, 2020

By: /s/ Zachary Hill
Zachary Hill, Bar No. 275886
MORGAN, LEWIS & BOCKIUS LLP
zachary.hill@morganlewis.com
One Market, Spear Street Tower
San Francisco, CA 94105-1596
Tel: +1.415.442.1000
Fax: +1.415.442.1001

1 Eric W. Sitarchuk*
2 Rebecca J. Hillyer*
3 MORGAN, LEWIS & BOCKIUS LLP
4 eric.sitarchuk@morganlewis.com
5 rebecca.hillyer@morganlewis.com
6 1701 Market Street
7 Philadelphia, 19103-2921
8 Tel: +1.215.963.5000
9 Fax: +1.215.963.5001

7 Wendy West Feinstein (pro hac vice)
8 MORGAN, LEWIS & BOCKIUS LLP
9 wendy.feinstein@morganlewis.com
One Oxford Centre, Thirty-Second Floor
Pittsburgh, PA 15219-6401
Tel: +1.412.560.7455
Fax: +1.412.560.7001

11 *Attorneys for Defendants*
12 *Teva Pharmaceuticals USA, Inc., Cephalon,*
13 *Inc., Actavis LLC, Watson Laboratories, Inc.,*
14 *and Actavis Pharma, Inc. f/k/a Watson Pharma,*
15 *Inc.*

16 *Denotes national counsel, pro hac vice
17 forthcoming

18 DATED: March 20, 2020

19 By: /s/ Sean O. Morris
20 Sean O. Morris
21 John D. Lombardo
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
22 Los Angeles, California 90017-5844
Telephone: +1-213-243-4000
Facsimile: +1-213-243-4199
Email: Sean.Morris@arnoldporter.com
Email: John.Lombardo@arnoldporter.com

23 *Attorneys for Defendants*
24 *Endo Pharmaceuticals Inc., Endo Health*
25 *Solutions Inc., Par Pharmaceutical, Inc.,*
26 *and Par Pharmaceutical Companies, Inc.*

1 DATED: March 20, 2020
2

3 By: /s/ Amy J. Laurendeau
4 Amy J. Laurendeau (S.B. #198321)
5 O'MELVENY & MYERS LLP
6 610 Newport Center Drive, 17th Floor
7 Newport Beach, CA 92660
8 (949) 823-6900
9 alaurendeau@omm.com

10 Charles C. Lifland (S.B. #108950)
11 Sabrina H. Strong (S.B. #200292)
12 O'MELVENY & MYERS LLP
13 400 S. Hope Street
14 Los Angeles, CA 90071
15 (213) 430-6000
16 clifland@omm.com
17 sstrong@omm.com

18 Amy R. Lucas (S.B. #264034)
19 O'MELVENY & MYERS LLP
20 1999 Avenue of the Stars, 8th Floor
21 Los Angeles, CA 90067
22 (310) 553-6700
23 alucas@omm.com

24 Stephen D. Brody (*pro hac vice*)
25 O'MELVENY & MYERS LLP
26 1625 Eye Street, NW
27 Washington, DC 20006
28 (202) 383-5300
sbrody@omm.com

29
30 *Attorneys for Defendant*
31 *Janssen Pharmaceuticals, Inc.*

1 DATED: March 20, 2020

2 By: /s/ Rocky C. Tsai
3 Rocky C. Tsai (SBN #221452)
4 *rocky.tsai@ropesgray.com*
5 Traci J. Irvin (SBN #309432)
6 *traci.irvin@ropesgray.com*
7 ROPES & GRAY LLP
8 Three Embarcadero Center
9 San Francisco, CA 94111-4006
10 Tel: (415) 315-6300
11 Fax: (415) 315-6350

12 *Attorneys for Defendant*
13 *Mallinckrodt LLC*

14 DATED: March 20, 2020

15 By: /s/ Michael Onufer
16 Michael Onufer (Bar No. 300903)
17 KIRKLAND & ELLIS LLP
18 555 South Flower Street
19 Los Angeles, CA 90071
20 Telephone: (213) 680-8400
21 Email: michael.onufer@kirkland.com

22 Jennifer G. Levy, P.C. (*pro hac vice*)
23 KIRKLAND & ELLIS LLP
24 1301 Pennsylvania Ave., N.W.
25 Washington, D.C. 20004
26 Telephone: (202) 879-5000
27 Facsimile: (202) 879-5200
28 Email: jennifer.levy@kirkland.com

29 Donna Welch, P.C. (*pro hac vice*)
30 Timothy W. Knapp, P.C. (*pro hac vice*)
31 KIRKLAND & ELLIS LLP
32 300 North LaSalle, Chicago, IL 60654
33 Telephone: (312) 862-2000
34 Facsimile: (312) 862-2200
35 donna.welch@kirkland.com
36 tknapp@kirkland.com

37 *Attorneys for Defendants*
38 *Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a/*
39 *Watson Pharmaceuticals, Inc., Allergan Sales,*
40 *LLC and Allergan USA, Inc.*

1 DATED: March 20, 2020
2

3 By: /s/ Elizabeth A. Sperling
4 Elizabeth A. Sperling (CA Bar No. 231474)
5 ALSTON & BIRD LLP
6 333 South Hope Street, 16th Floor
7 Los Angeles, CA 90071
8 Telephone: (213) 576-1000
9 Fax: (213) 576-1100
10 elizabeth.sperling@alston.com

11 Daniel G. Jarcho*
12 ALSTON & BIRD LLP
13 950 F Street, NW
14 Washington, DC 20004
15 Telephone: (202) 239-3300
16 Daniel.jarcho@alston.com

17 Cari K. Dawson (*pro hac vice*)
18 Jenny A. Hergenrother*
19 ALSTON & BIRD LLP
20 1201 West Peachtree Street, Suite 4900 Atlanta,
21 GA 30309-3424
22 Telephone: (404) 881-7000
23 cari.dawson@alston.com
24 jenny.hergenrother@alston.com

25 *Attorneys for Defendant Noramco, Inc.*

26 *Denotes National counsel who will seek *pro*
27 *hac vice* admission

1 DATED: March 20, 2020

2 By: /s/ Alan R. Ouellette
3 Alan R. Ouellette (SBN 272745)
4 FOLEY & LARDNER LLP
5 555 California Street, Suite 1700
6 San Francisco, CA 94104-1520
7 Tel: 415.434.4484
8 Fax: 415.434.4507
9 Email: aouellette@foley.com

10 James W. Matthews (*Pro Hac Vice* motion
11 forthcoming)
12 Ana M. Francisco (*Pro Hac Vice* motion
13 forthcoming)
14 Katy E. Koski (*Pro Hac Vice* motion
15 forthcoming)
16 FOLEY & LARDNER LLP
17 111 Huntington Avenue
18 Boston, MA 02199
19 Tel: 617.342.4000
20 Fax: 617.342.4001
21 Email: jmatthews@foley.com
22 Email: afrancisco@foley.com
23 Email: kkoski@foley.com

24 *Attorneys for Defendant Anda, Inc.*

25 DATED: March 20, 2020

26 By: /s/ Charles J. Stevens
27 Charles J. Stevens (SBN 106981)
28 Joshua D. Dick (SBN 268853)
Kelsey J. Helland (SBN 298888)
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
Fax: (415) 393-8306
cstevens@gibsondunn.com
jdick@gibsondunn.com
khelland@gibsondunn.com

1 Kaspar J. Stoffelmayr (pro hac vice
2 forthcoming)
3 Katherine M. Swift (pro hac vice forthcoming)
4 BARTLIT BECK LLP
5 54 West Hubbard Street
6 Chicago, IL 60654
7 Telephone: (312) 494-4400
8 Fax: (312) 494-4440
9 kaspar.stoffelmayr@bartlitbeck.com
10 kate.swift@bartlitbeck.com

11 *Attorneys for Defendant Walgreen Co.*

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ATTESTATION**

2 I, Sonya Winner, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence
3 to the filing of this document has been obtained from each signatory hereto.

4 DATED: March 20, 2020

5 By: /s/ Sonya D. Winner
Sonya D. Winner

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